

**JUL 06 2006****CATHY A. CATTERSON, CLERK**  
**U.S. COURT OF APPEALS****NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS****FOR THE NINTH CIRCUIT****GABRIEL SOTO-ARMENTA,****Petitioner,****v.****ALBERTO R. GONZALES\*\* , Attorney  
General,****Respondent.****No. 03-72404****Agency No. A90-070-314****MEMORANDUM\*****On Petition for Review of an Order of the  
Board of Immigration Appeals****Argued and Submitted May 6, 2005  
Pasadena, California****BEFORE: BROWNING, FISHER and BYBEE, Circuit Judges.**

Gabriel Soto-Armenta seeks review of the decision of the Board of Immigration Appeals (“BIA”) affirming the Immigration Judge (“IJ”), who found that petitioner’s California conviction constituted “sexual abuse of a minor” – an

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\*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

\*\* Alberto R. Gonzales is substituted for his predecessor, John Ashcroft, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

aggravated felony for purposes of immigration law – rendering him removable and ineligible for discretionary relief. We deny his petition because we lack jurisdiction.

The court does not have jurisdiction to review “any final order of removal against an alien who is removable by reason of having committed [an aggravated felony,]” 8 U.S.C. § 1252(a)(2)(C), but we have jurisdiction to determine whether the jurisdictional bar applies in a given case. *Murillo-Espinoza v. INS*, 261 F.3d 771, 773 (9th Cir. 2001).

We conclude that Soto-Armenta’s conviction for unlawful sexual intercourse with a minor more than three years younger in violation of Cal. Pen. Code § 261.5(c) qualifies as an aggravated felony for purposes of 8 U.S.C. § 1101(a)(43). Under the categorical approach, the conduct criminalized by Cal. Pen. Code § 261.5(c) falls within the meaning of “sexual abuse of a minor.” *See Afridi v. Gonzales*, 442 F.3d 1212, 1217 (9th Cir. 2006); *cf. Valencia v. Gonzales*, 439 F.3d 1046, 1053 n.4 (9th Cir. 2006). Although violations of § 261.5(c) may be punished either as felonies or as misdemeanors, here Soto-Armenta pled guilty to a felony charge. It is of no moment that his conviction was later reduced to a misdemeanor. *See Afridi*, 442 F.3d at 1217 n.2.

Even though the state court has expunged petitioner's conviction, "[f]or immigration purposes, a person continues to stand convicted of an offense notwithstanding a later expungement under a state's rehabilitative law." *Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002).

Petitioner in this case represented that he served in the Gulf War. Individuals who have served in the military during certain periods of hostility, including the Persian Gulf Conflict, may qualify for naturalization under 8 U.S.C. §§ 1439, 1440. We have no jurisdiction to consider this claim, but note that the government has represented to us in its letter brief that petitioner's "expungement and the military service would factor in heavily in assessing good moral character" for purposes of naturalization.

Because we conclude that petitioner committed an aggravated felony, we have no jurisdiction over his appeal.

**PETITION DENIED.**